Supreme Court, U.S.
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No. 02-1724

IN THE

Supreme Court of the United States

SECURITIES AMERICA, INC.,

Petitioner,

v.

CHARLES P. ROGERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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1. The Alabama Supreme Court's Decision Warrants Review by This Court Because It Undermines the Severability Doctrine of the Federal Arbitration Act.

The Alabama Supreme Court held squarely that "the trial court, as opposed to the arbitrator, must decide the ultimate question relating to the *legality*" of the "contract that contains a provision requiring that all claims arising therefrom be arbitrated." *SAI v. Rogers*, 2002 Ala. LEXIS 329, Pet. App. at 9a (quoting *Alabama Catalog Sales v. Harris*, 794 So. 2d 312, 315 (Ala. 2000)) (emphasis added).

As SAI demonstrated in its Certiorari petition, this holding – like the holdings of several other state courts[1] – undermines the severability doctrine established by Section 4 of the Federal Arbitration Act and *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*, 388 U.S. 395, 403-404 (1967), and its progeny. By interjecting the courts into the proceedings even though the making of the agreement to arbitrate is not in issue, the Alabama Supreme Court offends the primary purpose of the FAA, that arbitration agreements be placed on equal footing with all other contracts. *Southland Corp. v. Keating*, 465 U.S. 1, 16-17, n.11 (1984).

2. Respondents Do Not Defend the Alabama Supreme Court's Decision.

In opposing certiorari, Respondents ignore the decision of the Alabama Supreme Court under review and argue legal

1. *E.g.*, *Riverwalk Apartments, LP v. RTM Contractors, Inc.*, 779 So. 2d 537 (Fla. Dist. Ct. App. 2000); *Aste v. Metropolitan Life Ins. Co.*, 728 N.E.2d 629 (Ill. App. 2000); *Nature's 10 Jewelers v. Gunderson*, 648 S.W.2d 804 (S.D. 2002); *RPT of Aspen v. Innovative Communications, Inc.*, 917 P.2d 340 (Colo. Ct. App. 1996).

issues that were never raised before either the trial court or the Alabama Supreme Court. The decision under review was based on the court's determination that Wolas was not registered under the Alabama Securities Act and that therefore the Account Agreements and the arbitration clauses therein were unenforceable under Alabama Code § 8-6-19(g).[2] Pet. App. at 9a-11a. The court found that Respondents did not dispute the existence of the contracts or their applicability to this dispute. Pet. App. at 9a. Respondents now argue in their brief to this Court that by executing the Account Agreements on behalf of SAI using his alias "Allen Hengst", Wolas committed the crime of forgery. Thus, they argue SAI did not assent the agreements and the contracts never came into existence.[3]

This "forgery" concept appears for the first time in Respondents' Brief to this Court. Although some form of the word "forgery" appears on the first page and 26 more times in their Brief in Opposition to Petition For Writ of Certiorari, neither the word nor the concept appear in the

2. That, as Respondents correctly note, the facts of this case are unusual, does not make this a "fact-bound" case. The sole fact on which the Alabama Supreme Court based its decision that the arbitration agreement was unenforceable was simply that Wolas lacked a securities license. Pet. App. 10a.

3. This argument itself lacks merit – Respondents cite no authority in which a party seeking to enforce an agreement is barred from doing so because the signature of its agent was forged. Respondents' citation to the 1967 edition of WILLISTON ON CONTRACTS is to a section dealing specifically with bills of exchange and promissory notes, contracts that bear only the signature of the person to be charged with performance. *Cf.* Ala. Code § 8-9-2 (an agreement subject to the Alabama statute of frauds is enforceable if signed by the party to be charged with performance).

decision under review; nor in any of the nine briefs filed before the Alabama Supreme Court; nor in any of the briefs submitted to the trial court. In fact, in the entire 581 page record there is not a single instance of any form of the word "forge" or "forgery." Prior to filing their brief in this Court, Respondents never made any attempt to argue forgery or any related concept.[4] Similarly, neither forgery nor any related concept formed any part of the Alabama Supreme Court's decision. It is entirely improper for Respondents to raise this issue now. *See Glover v. United States*, 531 U.S. 198, 205 (2001) ("in the ordinary course we do not decide questions neither raised nor resolved below"); *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 522 (1991) (refusing to consider issue raised for the first time in response to a petition for writ of certiorari).

By arguing forgery, Respondents hope to suggest that the factual existence of the contract is at issue and to thereby harmonize this case with those Court of Appeals cases where the factual making of the arbitration agreement was at issue.

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4. Two further points need to be made about Respondent's "forgery" innovation. First, the record is entirely silent on whether the Librarian Allen Hengst authorized Wolas to use his name. (The record does reveal that the Librarian knowingly sheltered Wolas when Wolas fled New York. (*See* Pg. 539 of the record on appeal). Second, the record is clear that Wolas used "Allen Hengst" as an alias, that is, when he signed the name "Allen Hengst" he was signing the name by which identified himself and by which he was known to all. Pet. App. 6a (citing Respondent's Complaint). The signature of an alias, by itself, is not a forgery. *Tucker v. State*, 184 So. 2d 366 (Ala. App. 1966) (where defendant signed one of the names by which he was known he could not be convicted of forgery); *see also French American Banking Corp. v. Flota Mercante Grancolombiana, S.A.*, 752 F. Supp. 83 (S.D.N.Y. 1990) (the signing of an assumed name alone does not constitute forgery).

Those cases are inapplicable here. Not only have Respondents never before raised the forgery issue, they never challenged the factual "making" of either the arbitration clause or of the contract as a whole. As the Alabama Supreme Court held, Respondents conceded that they assented to the Account Agreements. Pet. App. 9a. (*See also* Pgs. 9-11 of record on appeal). Their challenge is only to the legality of those agreements.

Respondents' attempt to divert attention away from the Alabama Supreme Court's opinion serves two purposes. First, Respondents avoid having to support the Alabama Supreme Court's frankly erroneous refusal to even cite, much less follow, federal law. Second, by ignoring the Court's actual reasoning, Respondents downplay the split of authority between the decision of the Alabama Supreme Court and other state courts on one hand[5] and the decisions of the Fourth, Fifth, Sixth, Seventh and Eleventh Circuits on the other.[6]

Respondents' contention that *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), controls this case is erroneous because, as explained above, the issues litigated below concerned "neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." *Green Tree Fin'l Corp. v. Bazzle*, 2003 U.S. LEXIS 4798, *16 (Jan. 23, 2003). Under Respondent's reasoning,

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5. *See* cases cited in note 1, *supra*.

6. *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1162 (5th Cir. 1987); *Burden v. Check into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001); *Sweet Dreams Unlimited, Inc. v. Dial-a-Mattress, Int'l*, 1 F.3d 639 (7th Cir. 1993); *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002).

the question of "arbitrability," that is, whether "the parties agree[d] to submit the arbitrability question itself to arbitration," *First Options*, 514 U.S. at. 943, is raised every time there is a challenge to the legality of the underlying contract. This cannot be so. The defense of illegality, *see* Ala. R. Civ. P. 8(c), no more raises a "question of arbitrability" than does the defense of fraud in the inducement. *Prima Paint*, 388 U.S. at 403-406.

The question presented to the Alabama Supreme Court is the same as the question presented by this Petition: under the Federal Arbitration Act does the severability doctrine insulate arbitration agreements found in other agreements from allegations that the underlying agreements are illegal where no challenge is made to the legality of the arbitration agreement itself? This Court should answer that question in order to eliminate the confusion that has arisen among lower courts regarding the application of *Prima Paint* and Section 4 of the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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